85-1362

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAUL A. STERN, ET AL,

Petitioners

VS.

TARRANT COUNTY HOSPITAL DISTRICT, ET AL,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 11, 1986

QUESTIONS PRESENTED FOR REVIEW

1. Whether the equal protection clause forbids a state agency from purposefully and arbitrarily discriminating against one class of persons by denying staff privileges to osteopathic physicians in preference to a similarly situated class of persons.

2. Whether the Fourteenth Amendment prohibits a state from denying to all persons within its jurisdiction equal protection of its laws resulting from the discriminatory administration of a state law by a state agency.

3. Whether the due process clause prohibits a state agency from purposefully and arbitrarily depriving osteopaths of their statutorily created property interest of being considered for staff privileges based on professional and ethical merit and not on the basis of their medical degree.

4. Whether the Fifth Circuit may ignore the "clearly erroneous" mandate of Rule 52a Fed. R. Civ. P. and disregard findings of fact found by the district court and not challenged on appeal.

5. Whether a rational basis for the actions of a state agency can "reasonably be conceived" when those actions are in violation of state law and intentionally discriminate against one class of persons while favoring another.

6. Whether the conduct of a state agency, clearly acting in violation of state law, is entitled to the same presumptive validity afforded legislative enactments.

LIST OF THE PARTIES

Pursuant to Rule 21.1(b) the following is a list of all parties to the proceeding in the Fifth Circuit Court of Appeals:

Petitioners

a. Paul A. Stern, D.O.

b. C. Raymond Olson, D.O.

c. James Lee Walker, D.O.

d. Joel Alter, D.O.

e. William Russell Jenkins, D.O.

Respondents

f. Tarrant County Hospital District

g. John Peter Smith Hospital, Tarrant County, Texas

h. Harold B. Daley

i. Bruce K. Jacobson, M.D.

j. Robert L. McAfee

k. George H. Moore, M.D.

l. Harry A. Noah

m. Tim Philpot

n. James C. Pollard

o. Julius Truelson

p. George J. Luibel, D.O. — Defendant/Appellee

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OPINIONS BELOW

The Petitioners Paul A. Stern, D.O., C. Raymond Olson, D.O., James Lee Walker, D.O., Joel Alter, D.O. and William Russell Jenkins, D.O. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit *en banc* entered in this proceeding on December 18, 1985. The opinion and judgment of the Fifth Circuit Court of Appeals reversing the three-judge panel and the judgment of the district court appears in the Appendix hereto. The opinion rendered by the district court for the Northern District of Texas, including its findings of fact and conclusions of law is reported at 565 F.Supp. 1440. See Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit *en banc* was entered on December 18, 1985. A timely Petition for Reconsideration *En Banc* was denied on January 14, 1986, and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. CONST. amend. XIV §1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Medical Practice Act of Texas — Tex. Rev. Civ. Stat. art. 4495b, subchapter A §1.02(1), (9) (Vernon Supp. 1986):

Sec. 1.02. The Legislature makes the following declarations:

(1) The practice of medicine is a privilege and not a natural right of individuals and as a matter of policy it is considered necessary to protect the public interest through the specific formulation of this Act to regulate the granting of that privilege and its subsequent use and control;

(9) Recognizing that hospitals, facilities, institutions, or programs and state agencies and political subdivisions which own or operate hospitals, facilities, or institutions or administer programs are responsible for determining medical staff appointments or the qualifications of physicians for such

programs, and further recognizing that all persons licensed under this Act have met certain basic educational requirements, been examined by the board, and passed the same qualifying examination which applies the same standards to all who desire to practice medicine, irrespective of academic medical degree, it is the intent of the legislature to prohibit differentiation solely on the basis of the academic medical degree held by a person licensed under this Act in determining such medical staff appointments or such qualifications. To this end a hospital, institution, or program that is licensed by this state, that is operated by the state or a political subdivision of the state, or that receives state financial assistance, directly or indirectly, shall not differentiate solely on the basis of the academic medical degree held by a person licensed under this Act. Such hospitals, institutions, programs, and state agencies or political subdivision shall, however, be free to adopt reasonable rules, regulations, and requirements relating to qualifications for medical staff appointments, reappointments, termination of appointments, the delineation of clinical privileges, or the curtailment of clinical privileges of those who are appointed to such medical staff or permitted to participate in educational programs so long as such rules, regulations, and requirements are determined upon a reasonable basis, such as professional and ethical qualifications of the physician, upon standards that are reasonable, applied untainted by irrelevant considerations, supported by sufficient evidence, free of arbitrariness, capriciousness, or unreasonableness and do not differentiate solely upon the academic medical degree held by such physician.

3. FED. R. Civ. P. 52(a): Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

Petitioners' Background. This dispute arose because the Board of Managers of the Tarrant County Hospital District refused to grant privileges to any of the Petitioners solely on the basis of their osteopathic medical degree. Each physician applied separately for staff privileges at John Peter Smith Hospital in 1979. Petitioner Olson applied for staff privileges in 1970 and again in April, 1979. (S.F. 52-53) All of the Petitioners are physicians duly licensed by the Texas Board of Medical Examiners and have successfully completed two or more years of post-graduate training in a program accredited by the American Osteopathic Association (hereinafter "AOA"). All allopathic physicians (M.D.) and osteopathic physicians (D.O.) are required to pass the same licensure exam and meet other statutory requirements monitored by the Texas Board of Medical Examiners.

John Peter Smith Hospital. Respondent John Peter Smith Hospital is a public, tax supported hospital owned and operated by the Respondent Tarrant County Hospital District, a political subdivision of the State of Texas. The hospital is managed by the Board of Managers which board is composed of the individually named Respondents. Respondent hospital is a public general hospital primarily responsible for treatment of indigent patients of Tarrant County, Texas. (S.F. 286) John Peter Smith Hospital is the only public hospital in Tarrant County, Texas.

Hospital Staff Privileges Requirements. As late as February, 1979 the medical/dental staff bylaws of Respondent hospital specifically required that a physician needed to have an M.D. degree and post-graduate training which limited staff membership to only physicians holding M.D. degrees. (S.F. 253-54; Tr. 203) On February 28, 1979 the hospital's Board of Managers amended its bylaws to abandon the specific requirement of an M.D. degree, but then provided as minimum requirements for

all applicants to have two years of post-graduate training in a program accredited by the Liaison Committee on Graduate Medical Education (LCGME) and licensure by the State of Texas. At that time, an exception to these minimum requirements existed if the applicant was recommended to the staff by a head of a department and approved by the Staff Executive Committee.

However, Petitioner Stern applied for staff privileges pursuant to this stated exception upon the recommendation of the head of the Department of Anesthesiology and approval of the Staff Executive Committee. Upon presentation of those recommendations to the Board of Managers a decision was made that specific guidelines for exceptions to the minimum requirements should be promulgated and made a part of the bylaws. Ultimately, staff privileges were denied Petitioner Stern by the Board of Managers. All other Petitioners' request for privileges were subsequently denied at every level of consideration. The hospital's bylaws were then changed to delete the "exceptional cases" exception to the minimum requirements for staff privileges leaving the LCGME post-graduate training as a mandatory requirement without exceptions.

The bylaw requirement that the post-graduate training must be approved by the LCGME (now known as the Accreditation Counsel for Graduate Medical Education — ACGME) effectively excludes Petitioners and substantially all of the osteopathic physicians who reside in and pay taxes in Tarrant County, Texas from the staff of Respondent hospital. (Tr. 205) At trial, the Medical Director of Respondent hospital admitted that a considerable effort and numerous changes in the bylaws have been made for the purpose of keeping John Peter Smith Hospital an allopathic (M.D.) hospital. (S.F. 403-04, 423, 430-31; Tr. 207) Furthermore, the nature of the changes over the years to the hospital's bylaws and the statements of its Medical Director established that the LCGME post-graduate

training requirement was intended to discriminate against osteopathic physicians and had no other contemplated purpose. (S.F. 403-05, 423, 430-31)

Medical Practice Act of Texas. The Texas Medical Practice Act of 1981 recognizes that ". . . all persons licensed under this Act have met certain basic educational requirements, been examined by the Board, and passed the same qualifying examination which applies the same standards to all who desire to practice medicine, irrespective of academic medical degree . . ." Tex. Rev. Civ. Stat. art. 4590b subchapter A, sec. 1.02(9) (Vernon Supp. 1986). Among the "basic educational requirements" the Board of Medical Examiners requires graduation from "an approved medical school" and completion of a one-year program of graduate medical training. The "approved medical schools" and approved graduate medical training are described as those accredited by either the LCGME or the AOA. Title 22 Examining Boards, Part 9. Texas State Board of Medical Examiners, Chapter 163, Licensure by Examination, sec. 163.1(a), 163.2, 163.4, Licensure Qualifications for All Applicants, Vol. 6, No. 81, Oct. 27, 1981.

The Texas Legislature has expressly prohibited hospital staff membership requirements at public hospitals from being based upon the medical degree held by the physicians and further recognized the quality of both allopathic and osteopathic accrediting agencies. The Medical Practice Act of Texas expressly states that ". . . it is the intent of the Legislature to prohibit differentiation solely on the basis of the academic medical degree held by a person licensed under this Act in determining such medical staff appointments or such qualifications" and that the granting of staff privileges must be determined ". . . upon a reasonable basis, such as professional and ethical qualifications of the physician, upon standards that are reasonable, applied untainted by irrelevent considerations, supported by sufficient evidence, free of arbitrariness, capri-

ciousness, or unreasonableness . . .." Tex. Rev. Civ. Stat. art. 4595b, subchapter A. sec. 1.02(9) (Vernon Supp. 1986).

Proceedings in Courts Below. Petitioners filed this action against the Tarrant County Hospital District, John Peter Smith Hospital and the individual members of its Board of Managers. At trial, Petitioners did not seek monetary damages, but simply sought to enjoin the discriminatory practices which continued to deny consideration of their staff privileges solely on the basis that their post-graduate training program had not been accredited by the LCGME. (Tr. 44-53) Federal court jurisdiction was invoked under the provisions of 42 U.S.C., 1983, the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

A trial to the court was commenced on June 21, 1982. After receiving testimony, documentary evidence and briefing from the parties the trial court submitted an extensive memorandum opinion and order and entered judgment dated June 4, 1983. The district court judgment enjoined the Respondents from denying staff privileges at John Peter Smith Hospital by use of a bylaw requirement that the applicant's post-graduate training be accredited by the LCGME. (Tr. 179-210) An amended judgment and supplemental memorandum opinion dated August 19, 1983 was entered by the district court to clarify that the Petitioners would need to satisfy all other bylaw requirements for staff privileges if they had not already met those qualifications. (Tr. 222-26)

In support of its judgment the district court rendered numerous findings of fact pursuant to Rule 52(a) Fed. R. Civ. P. None of the district court's findings of fact were challenged on appeal by Respondents as "clearly erroneous" in order to have them set aside. The most significant of those district court findings of fact relevant to the questions presented for review are as follows:

UNCHALLENGED FINDINGS OF FACT

11. Until recently osteopathic physicians were unable to obtain training in programs approved by the Liaison Committee on Graduate Medical Education. Today they are able to do so in various governmental programs and certain other specialized programs. (TR. 205)

12. The 1981 session of the Texas Legislature enacted a Medical Practice Act which prohibited hospital staff membership requirements at public hospitals being based upon the medical degree held by the physician and the State Board of Medical Examiners promulgated its rules recognizing the equality of both allopathic and osteopathic accrediting agencies. (TR. 205)

13. The requirement that the post-doctoral training of a member of the Medical/Dental Staff of John Peter Smith Hospital be approved by the Liaison Committee on Graduate Medical Education, now known as the Accreditation Council for Graduate Medical Education, effectively excludes substantially all of the osteopathic physicians who reside in and pay taxes in Tarrant County from the Medical/Dental Staff of John Peter Smith Hospital and totally excludes all osteopathic physicians whose post-graduate medical training occurred prior to 1970. (TR. 305)

14. All post-graduate medical training in osteopathic institutions, in order to be accredited, must be approved by the American Osteopathic Association. The Liaison Committee on Graduate Medical Education, now known as Accreditation Council for Graduate Medical Education, accredits programs in institutions aligned with allopathic medicine only. The two accrediting programs are substantially the same and contains no significant differences. (TR. 205)

15. All physicians in Texas who are licensed to practice general medicine have been licensed by the State Board of

Medical Examiners whether they are osteopathic physicians (D.O.) or allopathic physicians (M.D.) and all physicians licensed to practice medicine in Texas, either osteopathic (D.O.) or allopathic (M.D.), are required to take and pass the same examination for licensure. The State Board of Medical Examiners is composed of both allopathic (M.D.) and osteopathic (D.O.) physicians (TR. 206)

18. The philosophical differences between allopathic medicine and osteopathic medicine are not sufficient to justify a differentiation between the two schools of medicine for purposes of medical staff privileges at a publicly owned and operated hospital. (TR. 207)

19. The requirement that post-doctoral training for staff membership be accredited by the Liaison Committee on Graduate Medical Education (now known as the Accreditation Council for Graduate Medical Education) is an arbitrary and false standard and is not a standard based upon a reasonable requirement and is primarily for the purpose of basing staff membership upon the holding of a academic medical degree of Doctor of Medicine as opposed of Osteopathy. (TR. 207)

20. The requirement that the post-doctoral training of staff members be approved by the Liaison Committee on Graduate Medical Education is not a requirement which has as foundation a reasonable basis such as professional and ethical qualifications or the common good of the public or the hospital itself. (TR. 207)

The district court concluded that there was no rational basis for the public hospital to treat allopaths and osteopaths differently in consideration of their applications for staff privileges. Accordingly, the court enjoined the hospital's discriminatory bylaw as a violation of the equal protection clause of the Fourteenth Amendment.

The judgment of the district court was initially affirmed by the Fifth Circuit Court of Appeals three judge panel and a majority opinion was authored by Judge Rubin. A concurring opinion authored by Chief Judge Clark endorsed the majority opinion and alternatively observed that the hospital's bylaw was a violation of the due process clause of the Fourteenth Amendment. Judge Goldberg dissented.

Subsequently, the Fifth Circuit Court of Appeals entered judgment on rehearing *en banc* reversing the judgment of the district court on the premise that the hospital acted rationally in pursuit of a legitimate state purpose. The *en banc* court reached this conclusion in spite of the fact that the actions of the hospital's Board of Managers was a purposeful and intentional violation of the Medical Practice Act of Texas and that Respondents had failed to challenge any of the findings of fact underlying the district court's "rational basis" analysis. In a sharply worded opinion assailing the reasoning and conclusions of the majority, five judges respectfully dissented. Petitioners timely filed this Petition for Writ of Certiorari seeking review of these significant constitutional issues.

REASONS FOR GRANTING THE WRIT

A. The Decision Of The Fifth Circuit En Banc Raises Significant Issues Regarding Application Of The Fourteenth Amendment To Prohibit Purposeful Discrimination By State Agencies Which Deny One Class Of Persons The Equal Protection Of A State Law.

The Fifth Circuit's opinion in this case raises serious questions regarding the viability of the equal protection and due process clauses of the Fourteenth Amendment to prohibit the purposeful and intentional discrimination against persons intended to be protected by provisions of a state law. The importance of and error in the majority opinion's equal protec-

tion analysis is succinctly identified in the opening remarks of the dissenting opinion:

> "The majority opinion refuses to prevent a state agency from discriminating against osteopathic physicians in favor of allopathic physicians in defiance of state law. In so doing, it disregards both the plain language of the Fourteenth Amendment and the historic reasons for its enactment, for the equal protection clause forbids, and was intended to forbid, a state to purposefully and arbitrarily deny to one class of persons the protection of a state law that it affords to another class of persons." (Dissenting Opinion, p. 1633)

The unchallenged findings of fact taken together with the legislative enactment of the Texas Medical Practice Act of 1981 established without question that Respondents purposefully violated the constitutional rights of the Petitioners.

The overriding purpose of the equal protection clause of the Fourteenth Amendment is to protect persons from discriminatory and unequal state action both through the enactment of discriminatory laws and the discriminatory enforcement of laws. Regardless of the method used the discriminatory effect on the person or class of persons is the same. A state agency, as in this case, that purposefully treats one class of persons (allopathic physicians) differently than a similarly situated class of persons (osteopathic physicians) in the face of a state law that requires equal treatment violates the equal protection guarantee. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). The equal protection clause was enacted and intended to assure that the states afford to all persons within their jurisdiction the equal protection of their own laws. *Monroe v. Pape,* 363 U.S. 167, 180 (1961). The purpose of the equal protection clause was to forbid not only the enactment of discriminatory laws, but also to protect against the discriminatory administration or enforcement of laws neutral on their face.

The "exceptional importance" of the equal protection issues presented here is strongly indicated by the Fifth Circuit's *en banc* review under Rule 35(a) F.R.A.P. and by the sharply divided opinions of the majority and dissenting judges. While the majority opinion agrees that Texas law requires doctors holding M.D. and D.O. degrees to be treated alike in applying to a public hospital for staff privileges and acknowledges that the Respondents purposefully violated that law, the court refuses to consider the discriminatory administration of the state law a denial of equal protection. The long standing and purposeful discriminatory design and effect of favoring one class of persons over another in direct violation of state law is a clear and egregious denial of constitutional equal protection rights.

Additionally, the majority opinion is based on the premise that the Respondents acted rationally in pursuit of a legitimate state purpose. In reaching this conclusion the court disregarded the district court's findings of fact to the contrary and, instead, made presumptions that a "conceivable basis" for the agency's discriminatory action may exist. In other words, in its equal protection analysis the majority opinion afforded a state agency, shown to be intentionally discriminating against a class of persons in open violation of a state law, the same deference and presumption of validity extended to legislative enactments. Arguably, the court would extend the same presumption of validity to the decisions of every state agency, however petty or limited in its jurisdiction and discriminatory in its administration of state law. According to the majority opinion the Federal Court of Appeals equal protection analysis is restricted to evaluating the state agency's post-hoc suggestion of a "conceivable basis" that might have been in the agency's mind, even though the unchallenged findings of fact establish that it was not. Subordinate agencies have never been accorded such deference to their determinations validated on the basis of fictional rationalizations especially under the

discriminatory facts established by the evidence at bar. *Bose Corp. v. Consumers Union of U.S., Inc.*, _____ *U.S.*, _____, 104 S.Ct. 1949, _____ L.Ed. 2d _____ (1984); *United States v. New Orleans Public Serv.*, 723 F.2d 422, 428-29 (5th Cir. 1984); *Jones v. Diamond*, 636 F.2d 1364, 1370, n.7 (5th Cir. 1981).

B. This Case Presents Constitutional Questions Whose Resolution Will Have Immediate Importance Far Beyond The Particular Facts And Parties Involved.

As recognized in the dissenting opinion, the majority opinion refuses to apply the literal mandate of the constitution and ignores the history that lead to enactment of the Fourteenth Amendment. At first glance, the majority opinion "condones the bigotry of an allopathic-dominated state hospital district" and denies the Petitioners any opportunity to obtain staff privileges at the public hospital. An inability to obtain staff privileges has, of course, significant economic effect on the ability of the Petitioners to practice medicine in Tarrant County, Texas. However, the decision of the court below also has certain actual and practical consequences for other litigants and in numerous other factual and legal situations.

First, the majority opinion not only affects the five osteopathic physicians who petition this Court for writ, but it also affects all osteopathic physicians who now or in the future will seek to practice medicine in Tarrant County, Texas and surrounding areas. Respondent John Peter Smith Hospital is the only public hospital in Tarrant County, Texas and acquisition of staff privileges there is an important asset to a physician's practice. It is important to note here that the district court did not order Respondents to grant privileges to the Petitioners, but simply enjoined Respondents from denying staff privileges solely on the basis of the Petitioners' osteopathic training. Petitioners simply are seeking the state created right protected by the equal protection clause to have their application

for staff privileges considered on reasonable grounds such as professional and ethical merit.

Secondly, the majority opinion encourages statewide discrimination against the nearly 1,390 osteopathic physicians practicing in the state of Texas. Rendering of the *en banc* decision, widely publicized in state newspapers and throughout the medical profession undoubtedly notified all public and tax supported hospitals that they may administer the provisions of the Texas Medical Practices Act to discriminate against osteopathic physicians.

An additional important consideration is that the inverse of the present circumstances can easily occur. In other words, if in the future osteopathic physicians arrest decision making control over staff privileges at John Peter Smith Hospital or at other public hospitals in Texas, then under the majority opinion all allopathic (M.D.) trained physicians could be denied staff privileges in the discriminatory manner accomplished here. The public interest is harmed in either event. Moreover, the inherent professional prejudice existing between osteopathic and allopathic physicians is not peculiar to the geographical boundaries of the state of Texas, but exists and will continue to produce litigation throughout the nation unless the equal protection rights of both groups are clearly confirmed by the Supreme Court.

The equal protection analysis and potentially devastating effect of the majority decision is not limited to only state agencies meting out staff privileges at public hospitals. To the contrary, the principles adopted by the court's equal protection analysis encourages other state agencies to purposefully deny equal protection of a state's laws to its citizens in every context imaginable. The reasoning of the court, if allowed to stand, would permit state agencies to purposefully discriminate against a class of persons, in direct violation of a state law non-

discriminatory on its face, as long as the state agency can manufacture a "conceivable basis" for its unlawful conduct.

Perhaps more importantly than the rights of the Petitioners and those potential litigants similarly situated, is the effect of the court's decision on the citizens of Tarrant County, Texas. The decision of the court denies all indigent patients of Tarrant County, Texas from the opportunity to receive care from an osteopathic physician of their choosing. In this regard, indigent patients who must receive their care at John Peter Smith Hospital are denied the opportunity of selecting an osteopathic physician enjoyed by non-indigent patients. However, non-indigent patients who, due to geographical considerations, prefer to be hospitalized at John Peter Smith Hospital, also may not receive the services of the osteopathic physician of their choice due to his inability to obtain staff privileges.

Again, these arbitrary and unnecessary restrictions on the rights of patients to select between osteopathic and allopathic care would involve patients hospitalized at public hospitals throughout the state of Texas. All of these untoward consequences violate the Texas Legislature's primary purpose of creating and maintaining through public funding public hospitals to serve the needs of the citizens of Texas. It is in furtherance and protection of the general public interest in good medical care that the Texas Medical Practice Act was enacted.

In conclusion, it is inevitable that the circumstances which gave rise to this litigation will continually reoccur not only in the context of osteopaths seeking staff privileges throughout the United States, but also in all related instances in which state agencies choose to (and may now be encouraged to) administer state laws in a manner to purposefully discriminate against a particular class of persons.

C. The Fifth Circuit's Refusal To Accept The Findings Of Fact Is A Departure From Accepted And Usual Judicial Proceedings Requiring Exercise Of The Supreme Court's Power Of Supervision.

Whether there is a rational basis for treating differently two classes of persons must turn on the facts distinguishing these classes as shown by the evidence. In reliance upon the belief that justice for the Petitioners would be contingent upon establishing through competent evidence all relevant facts, Petitioners carried their burden of proof in the district court. As required by Rule 52(a) Fed. R. Civ. P. the district court specifically stated extensive findings of fact supporting its decision that a rational basis did not exist to justify denial of the Petitioners' application for staff privileges on the basis of their osteopathic training.

On appeal, the majority opinion *en banc*, though recognizing the accuracy of the lower court's findings of fact, completely disregarded those findings and, instead, based its judgment on speculative presumptions unsupported by the evidence. The consistent application of the Federal Rules of Procedure and reliability upon the guidelines for federal appellate review is directly called into question by this unprecedented disregard of Rule 52(a).

Rule 52(a) Fed. R. Civ. P. mandates that facts found by the district court are to be accepted on appeal unless proven to be "clearly erroneous." Respondents (Appellants in the court below) asserted no challenge to the accuracy of the district court's findings of fact which conclusively established that no rational basis existed for treating allopathic and osteopathic physicians differently on application for staff privileges.

Further, the majority opinion attempts to rely on dicta appearing in this Court's half a century old decision of *Hayman v. City of Galveston,* 273 U.S. 414 (1927). The context of the *Hayman* decision was one of reviewing the district court

judgment on a motion directed to the pleadings which dismissed the case for want of equity. *Hayman*, 273 U.S. at 416. As the legal profession has evolved to the point that such a procedural event could no longer occur in Texas, so has the medical profession changed undercutting the factual basis for the *Hayman* decision.

In *Hayman*, the Supreme Court noted that there were "numerous systems or methods of treating diseases authorized to practice in Texas" and that in the management of a hospital, a choice among those methods of treatment would be inevitable. *Hayman*, 273 U.S. at 417. Under those circumstances the court felt that the choice by the board to exclude osteopaths was found to have a "basis in the exercise of the judgment of the state board" which was neither unreasonable nor arbitrary. *Hayman*, 273 U.S. at 417.

However, on the basis of the evidence presented to the district court in the case at bar and the changed circumstances demonstrated from those which existed more than 50 years ago, the district court felt compelled to examine the exclusion of osteopaths from a public hospital in light of contemporary principles of equal protection and current state law. In the case at bar, the evidence showed that the obvious differences which once distinguished osteopathic physicians (D.O.'s) from allopathic physicians (M.D.'s) have virtually disappeared in that there are no material or significant differences between the medicine practiced by the two groups. (S.F. 34-38, 51-52, 59, 84-88, 138-39, 141-42, 149-52, 174; Tr. 205)

Additionally, since the *Hayman* decision the Texas Legislature determined and has mandated equal treatment between osteopathic and allopathic physicians at public hospitals declaring, among other things that "state agencies or political subdivisions shall not differentiate solely on the basis of the academic medical degree held by a person licensed under this act." Moreover, graduates of allopathic and osteopathic institu-

tions are now required to pass the same licensure examination after graduating from institutions approved by the Texas Board of Medical Examiners.

Consequently, the district court was not only permitted to review the equal protection claims of the Petitioners in light of the current statutory law and in the current context of the medical profession, but it was compelled to do this by the well recognized standards of judicial review and equal protection analysis. Failure of the district court to consider these substantial changes in state law and within the medical profession would have been irresponsible and contrary to the interest of justice. Furthermore, the evidence adduced at trial and not challenged on appeal established beyond any doubt that the distinction drawn by the allopathic controlled Board of Managers between M.D.'s and D.O.'s was arbitrary, not founded upon a reasonable basis and, in fact, not founded upon any recognizable distinction in the way that the two groups are accredited and practice medicine. (S.F. 34-38, 51-52, 59, 84-88, 118, 141-42, 149-52, 174, 403-04, 423, 430-31)

CONCLUSION

For the above and foregoing reasons, a Writ of Certiorari is respectfully requested to be issued to review the *en banc* judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

I. Opinion of the Court of Appeals *en banc*

II. Judgment on Rehearing *en banc*

III. Order denying reconsideration *en banc*

IV. Fifth Circuit Panel opinion (withdrawn)

V. District Court opinion (including findings of fact)

(SEPARATELY BOUND)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 1986, three copies of the Petition for Writ of Certiorari and separately bound Appendix were mailed, postage prepaid, to Mr. Fred M. Schattman, 200 W. Belknap Street, Fort Worth, Texas 76196-0201, counsel for the Respondents. I further certify that all parties required to be served have been served with a copy of this petition.

Kevin J. Keith

Kevin J. Keith